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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MICHAEL E. DAVIS, aka TONY DAVIS,
VINCE FERRAGAMO, and BILLY JOE
DUPREE, on behalf of themselves and all
others similarly situated,

Case No. 10-CV-3328-RS (DMR)

**DEFENDANT ELECTRONIC ARTS
INC.'S NOTICE OF MOTION AND
MOTION FOR SUMMARY JUDGMENT**

Plaintiffs,

Date: April 19, 2018
Time: 1:30 p.m.
Dept.: Courtroom 3, 17th Floor
Judge: Hon. Richard Seeborg

v.
ELECTRONIC ARTS INC.,

Date Filed: July 29, 2010

Defendant.

Trial Date: TBD

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NOTICE OF MOTION AND STATEMENT OF RELIEF SOUGHT

PLEASE TAKE NOTICE that, on April 19, 2018, at 1:30 p.m., or at such other time as the Court may direct, before the Honorable Richard Seeborg, United States District Court, 450 Golden Gate Avenue, Courtroom 3 – 17th Floor, San Francisco, California, 94102, Defendant Electronic Arts Inc. will, and hereby does, move the Court for entry of summary judgment.

This Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities below, the Declarations of R. James Slaughter, Ryan Ferwerda, Donny Moore, Jeremy Strauser, Timothy Cowan, and E. Deborah Jay filed herewith (or previously), and such other and further papers, evidence, and argument as may be submitted to the Court in connection with the hearing on this Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

A complaint is a promise. It tells the court, “trust me, I can prove what I allege.”

Plaintiffs here have told the Court to trust that their identities appear in *Madden NFL* and to trust that NFL team media guides contain information “consistently identical” to information about historic-team avatars in *Madden NFL*. The time for trust has passed, discovery has closed, and the record is set. And the evidence proves that Plaintiffs cannot live up to their promises and that EA is entitled to summary judgment on all of Plaintiffs’ claims.

Identifiability is the lynchpin of a right of publicity claim. Each Plaintiff here must prove that more than a *de minimis* number of people identify a specific avatar as him, and yet no Plaintiff has adduced *any* evidence to show that anyone identifies the at-issue avatars in *Madden NFL* as Plaintiffs. EA is entitled to summary judgment because Plaintiffs cannot prove they are identifiable in *Madden NFL*.

Plaintiffs' claims also are barred by the First Amendment. Recent Ninth Circuit law confirms that Plaintiffs' right of publicity claim, as applied to EA's expressive work, is a presumptively invalid content-based restriction on speech. The Court need not reach the transformative-use test to hold that *Madden NFL* is protected by the First Amendment. But even if it did, the full factual record proves that EA's alleged use is transformative.

Plaintiffs' claims also are preempted by the Copyright Act. The Court denied EA's motion to dismiss Plaintiffs' Second Amended Complaint ("SAC") on copyright preemption grounds because the Court ruled that Plaintiffs' likenesses were not "fixed" in a tangible medium of expression as required for protection by the Copyright Act. In fact, courts consistently have held that the audiovisual elements in a video game are "fixed" under the Act.

Finally, Plaintiffs' ancillary claims for conversion, trespass, unfair competition, and unjust enrichment derive from, and depend upon, Plaintiffs' right of publicity claim, and they therefore fall when that claim falls. The claims also fail for myriad independent reasons as detailed below.

The Court should enter judgment for EA on all of Plaintiffs' claims.

1 **II. FACTUAL BACKGROUND**

2 EA is a leading developer and publisher of interactive videogames. For more than 25
 3 years, EA has published *Madden NFL*, a game that allows users to experience the excitement and
 4 challenge of NFL football by combining advanced software and creative audiovisual elements.¹
 5 *See* Decl. of R. James Slaughter in Supp. of Mot. for Summ. J. (“Slaughter Decl.”), Ex. A (Decl.
 6 of Ryan Ferwerda previously filed at ECF No. 178 (“Ferwerda Decl.”)) ¶ 6.

7 **A. Plaintiffs Target *Madden NFL*’s “Historic Teams”**

8 The core of the *Madden NFL* game experience is a simulation of the then-current season’s
 9 actual NFL teams. *See* Ferwerda Decl. ¶ 10. Those “current teams” are comprised of players
 10 from the upcoming NFL season—in the case of *Madden NFL 09*,² players who played on NFL
 11 teams in the 2008-09 season—and those current players are identified by their real names, photos,
 12 jersey numbers, and accurate characteristics. *Id.*

13 Plaintiffs’ claims focus not on these current teams, but instead on the avatars in so-called
 14 “historic teams,” a separate feature that previously was available on certain platform editions of
 15 *Madden NFL*.³ *Id.* ¶ 11. EA discontinued the historic-team feature entirely after *Madden NFL*
 16 *09*. *See id.*; Moore Decl. ¶¶ 6, 10. The historic-teams feature allowed users to control certain
 17 teams from NFL history, ranging from the 1950s to the early 2000s. Ferwerda Decl. ¶ 12. Like
 18 the current teams, these historic-teams featured team names, logos, and jerseys, all licensed from
 19 the NFL. *Id.* ¶ 17. But the similarities ended there, and the avatars on the historic-teams are
 20 fundamentally different from the current teams in material ways:

- 21 • The historic-team avatars do not include names or likenesses (visual images) of
 real players.
- 22 • The historic-team avatars’ jersey numbers do not match numbers worn by real

23
 24 ¹ EA previously lodged with the Court versions of *Madden NFL 09* for the PlayStation 2 and
 Xbox, as well as a Sony PlayStation 2 console, an Xbox console, and corresponding controllers.
 25 *See* ECF Nos. 178-1 & 178-2 (Notices of Manual Filing). EA incorporates by reference those
 filings here.

26 ² *Madden NFL 09* is the only edition that falls within the statute of limitations. *See* section IV.E
 27 *infra*.

28 ³ Historic-teams were included only in the PlayStation 2, Xbox, Wii, PSP, and Nintendo DS
 versions of *Madden NFL 09*. *See* Slaughter Decl., Ex. B (Decl. of Donny Moore previously filed
 at ECF No. 179 (“Moore Decl.”)) ¶ 6; *see also* Ferwerda Decl. ¶ 11.

1 players playing in the same position on real historic teams.

2

- 3 The historic-team avatars share a limited number of generic faces that were never
4 custom-designed for any historic player.
- 5 The historic-team avatars have generic features, such that numerous avatars share
6 identical heads, bodies, hair color, and skin tone.

7 *See generally* Ferwerda Decl. ¶¶ 10–15. Scores of other avatars are identical to the avatars that
8 Plaintiffs claim depict them—sharing the same generic face, height, weight, age, and years
9 played. *Id.* ¶ 15.

10

11 **B. Historic-team Avatars Contain Numerous Elements Created by EA's
12 Designers**

13 The historic-team avatars contain several graphic and data components. Graphically, each
14 avatar has a generic face and body and team indicia (logos and uniforms) licensed from third
15 parties. *See* Slaughter Decl., Ex. C (Decl. of Jeremy Strauser previously filed at ECF No. 21
16 (“Strauser Decl.”)) ¶¶ 8-10; Ferwerda Decl. ¶¶ 15, 17. For data, EA designers assigned each
17 avatar player ratings values for a variety of subjective physical and skill characteristics. Slaughter
18 Decl., Ex. D (“Moore Dep.”) at 48:15-19 (“[E]arly versions of Madden had . . . 10 or 15 different
19 ratings that made a player. Current versions are upwards of . . . 75 or 100 different data points
20 that comprise the player.”). The player ratings were a product of the judgment and imagination of
21 EA's game designers, who adjusted the avatars' ratings so that a given historic-team would reflect
22 the overall, general playing style of its actual team counterpart. *Id.* at 116:16-18 (“We wanted to
23 make sure that the team was . . . rated generally wherever they were good or bad.”); Ferwerda
24 Decl. ¶ 14.

25 For example, a high-powered passing offense would have had a quarterback and wide
26 receivers with high rankings, while a stingy defense might have had a strong and quick defensive
27 line. Moore Dep. at 116:9-117:8; *see also* Slaughter Decl., Ex. E (“Ferwerda Dep.”) at 47:12-14
28 (“[I]t's about team strength, so if a team passes a lot then the quarterback would have naturally
higher passing attributes.”); *id.*, Ex. F (“Carty Dep.”) at 102:20-103:2 (“I remember adjusting
some ratings so the overall positional groups on teams would better reflect what the team
was . . . We would increase the ratings of the defense players so it would look closer to what the

1 actual team was.”). These ratings were a form of commentary—evaluations by EA’s game
 2 designers about the comparative strengths and weaknesses of historic-teams. *See* Moore Dep. at
 3 117:1-3 (“[H]istoric teams’ pass defenses are normally 90 or 95, we will make [a historic-team’s
 4 pass defense ratings] 80 or 85 because they weren’t good.”). Avatars also were assigned certain
 5 specific, objective characteristics—height, weight, age, and years played. *Id.* at 98:19-99:5.
 6 Collectively, these myriad subjective and objective characteristics assigned to each historic-team
 7 avatar in *Madden NFL 09*, together with a game-player’s skill in controlling them, determined the
 8 outcome of the fictitious games within *Madden NFL*. *Id.* at 215:19-20; *see also* Ferwerda Dep. at
 9 17:17-22.

10 **III. PROCEDURAL HISTORY**

11 Plaintiffs Michael E. Davis, Vince Ferragamo, and Billy Joe Dupree are retired football
 12 players who filed this action in 2010 alleging violations of their statutory and common publicity
 13 rights, as well as derivative state law claims. *See* ECF No. 1, 11.

14 In 2011, EA filed motions to dismiss and strike the First Amended Complaint, which the
 15 parties briefed for this Court and the Ninth Circuit. For the purposes of those motions, EA
 16 assumed the truth of Plaintiffs’ allegation that EA had used their likenesses in *Madden NFL 09*.
 17 *See* ECF Nos. 62 at 1; 63 at 1; 110 at 3.

18 Upon return from the Ninth Circuit, the Court denied Plaintiffs’ motion for class
 19 certification in February 2017. ECF No. 204. The Court found that Plaintiffs could not certify a
 20 nationwide class based on California right of publicity law. *Id.* at 1, 7. Because it denied
 21 Plaintiffs’ motion on choice of law grounds, the Court did not reach EA’s other arguments.

22 On August 4, 2017, this Court granted EA’s motion for partial summary judgment on
 23 Plaintiffs’ statutory right of publicity claim. ECF No. 263 (“PSJ Order”). The Court concluded
 24 that EA was entitled to judgment on this claim because none “of the avatars in the *Madden* games
 25 could be ‘readily identified’ as corresponding to any specific plaintiff based on the appearance of
 26 the avatar alone.” *Id.* at 4.⁴

27 ⁴ *See also* PSJ Order at 3 (“[T]here is no dispute that *Madden* games do not include the names,
 28 voices, signatures or photographs of the named plaintiffs or any putative class members.”); ECF
 No. 316 (“PSJ Recons. Order”) at 6 (“[N]o reasonable fact-finder could conclude that a particular
 avatar is identifiable as a particular player based solely on the appearance of the image.”).

1 Also on August 4, 2017, the Court granted Plaintiffs leave to file their SAC, though the
 2 Court specifically noted that its order did not revive Plaintiffs' statutory right of publicity claim
 3 and that discovery remained closed. *See* ECF No. 264. Thus, there are only five operative claims
 4 in the SAC: common law right of publicity, conversion, trespass to chattels, unjust enrichment,
 5 and California Business & Professions Code Section 17200.

6 Discovery closed on July 14, 2017. *See* Slaughter Decl. ¶ 3. In January 2018, Magistrate
 7 Judge Ryu granted EA's motion for sanctions related to Plaintiffs' discovery misconduct. *Id.*
 8 Among other evidentiary sanctions, Judge Ryu held that Plaintiffs were precluded, absent
 9 substantial justification, from relying on documents that they have not yet produced. *Id.* Judge
 10 Ryu also indicated her intent to order Plaintiffs to pay monetary sanctions to EA. *Id.*⁵

11 **IV. ARGUMENT**

12 A motion for summary judgment shall be granted "if the pleadings and admissions on file,
 13 together with the affidavits, if any, show that there is no genuine issue as to any material fact and
 14 that the moving party is entitled to judgment as a matter of law." PSJ Order at 2 (citing Fed. R.
 15 Civ. P. 56(c)).

16 Where, as here, the moving party does not bear the burden of proof at trial, it need only
 17 point out that there is "an absence of evidence to support the nonmoving party's case." *Celotex*
 18 *Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *see also* Fed. R. Civ. P. 56(c)(1)(B). It is then the
 19 nonmoving party's burden to go beyond the pleadings and adduce competent, admissible
 20 evidence that "set[s] forth specific facts showing that there is a genuine issue for trial." *Celotex*,
 21 477 U.S. at 322; *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002); Fed. R. Civ. P.
 22 56(c)(1)(B), (c)(4). "[T]he non-moving party must bring forth material facts, *i.e.*, 'facts that
 23 might affect the outcome of the suit under the governing law.' PSJ Order at 2 (citation omitted).
 24 "A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to
 25 return a verdict for the nonmoving party. This requires evidence, not speculation." *Mil-Spec*
 26 *Monkey, Inc. v. Activision Blizzard, Inc.*, 74 F. Supp. 3d 1134, 1139 (N.D. Cal. 2014) (citation
 27 omitted).

28 ⁵ As of the date of the filing of this Motion, Judge Ryu has not issued her final order.

1 **A. The Avatars In *Madden NFL* Are Not Identifiable As Plaintiffs**

2 “Identifiability . . . is a central element of a right of publicity claim.” *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1102 (9th Cir. 1992).⁶ To meet this identifiability burden, a plaintiff must prove that his identity “was actually used”⁷ by adducing admissible evidence that his identity is “readily identifiable” as him—that is, “one who views the [image] with the naked eye can reasonably determine that the person depicted in [it] is the same person who is complaining of the unauthorized use.” *Newcombe*, 157 F.3d at 692; PSJ Order at 4 (same); *see also* PSJ Recons. Order at 6 (“[N]o reasonable fact-finder could conclude that a particular avatar is identifiable as a particular player based solely on the appearance of the image.”).

10 This standard requires a plaintiff to present evidence that he is identifiable by people *other than himself*. Some courts, including the Ninth Circuit, have held that the allegedly misappropriated image must be widely understood and publically known as the plaintiff. *See, e.g., Waits*, 978 F.2d at 1102 (“The court instructed the jury: ‘A professional singer’s voice is widely known if it is known to a *large number* of people throughout a *relatively large* geographic area.’”) (emphasis in original). At a minimum, a plaintiff must present admissible evidence that he is recognized by more than a *de minimis* number of people other than himself. *See, e.g., Henley v. Dillard Dep’t Stores*, 46 F. Supp. 2d 587, 595 (N.D. Tex. 1999) (“[F]ifteen percent of those asked believed Don Henley was a spokesman for or endorser of the ad, and thus, necessarily identified him from the ad. The results of this survey clearly prove that Don Henley was reasonably identifiable in Defendant’s ad to more than a *de minimis* number of persons.”).⁸ “Otherwise, non-celebrities who see some vague resemblance between themselves and a

23 ⁶ *See also Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 826-27 (9th Cir. 1974) (“[I]f the district court correctly determined as a matter of law that plaintiff is not identifiable in the commercial, then in no sense has plaintiff’s identity been misappropriated.”); Restatement (Third) of Unfair Competition § 46 cmt. d (1995) (“The use must therefore be sufficient to identify the person whose identity the defendant is alleged to have appropriated.”).

24 ⁷ *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 692 (9th Cir. 1998); *see also Eastwood v. Super. Ct.*, 149 Cal. App. 3d 409, 416 (1983).

25 ⁸ *See also* J. Thomas McCarthy, *The Rights of Publicity & Privacy* (2017 ed.) (“McCarthy”) § 3:12 (“There must be some ‘de minimis’ rule to filter or screen out the frivolous cases where only the plaintiff and a few sympathetic relatives and friends can see any connection between the defendant’s use and plaintiff.”).

1 professional model in an advertisement would have a claim. Similarly, celebrities may be overly
 2 sensitive to only vague resemblances between a professional model or computer-generated
 3 character and themselves.” *McCarthy* § 3:12.

4 *Pesina v. Midway Manufacturing Co.*, 948 F. Supp. 40 (N.D. Ill. 1996), is instructive.
 5 There, the plaintiff alleged that his image had appeared in the defendants’ video game. *Id.* at 42.
 6 The court granted summary judgment because “defendants present[ed] convincing evidence that
 7 the public does not recognize [plaintiff] in the home version of Mortal Kombat and Mortal
 8 Kombat II and the related products.” *Id.* Although it was undisputed that defendants had filmed
 9 plaintiff’s movements for inclusion in their games, the court found the alleged likeness
 10 unidentifiable because the plaintiff’s “movements were extensively altered prior to being
 11 incorporated into the game” and “after comparing [plaintiff] and the game character . . . who
 12 allegedly resemble[d] the plaintiff, only 6% of 306 Mortal Kombat users identified [plaintiff] as
 13 the model.” *Id.*; *see also McCarthy* § 3:10 (“If a character in an expressive work, such as a
 14 motion picture or video game, does not bear plaintiff’s name and has attributes that bear only a
 15 vague similarity to plaintiff, identifiability is not established.”).⁹

16 Here, Plaintiffs have no evidence that the public identifies the avatars in *Madden NFL* as
 17 Plaintiffs. In fact, the only admissible, and undisputed, evidence proves the opposite—the
 18 videogame-playing public does *not* identify the avatars in *Madden NFL* as Plaintiffs. EA
 19 surveyed a random selection of 1,253 adults who played football video games and who fit
 20 squarely within EA’s target market in 2008 when *Madden NFL 09* was published.¹⁰ Participants
 21 were shown screenshots from *Madden NFL 09* that featured pictures of the avatars (including
 22 those avatars that Plaintiffs claim depict them) alongside the information that Plaintiffs allege
 23 constitutes their identity. The results do not even meet a *de minimis* threshold:

24 • **Davis.** Fewer than 1% identified Tony Davis as the avatar he claims depicted him.
 25 In fact, 5% identified the avatar as a real player *other than* Davis, and 94% could

26 ⁹ *See also Moore v. Weinstein Co. LLC*, 545 F. App’x 405, 408-09 (6th Cir. 2013) (affirming
 27 summary judgment against plaintiff who claimed that a movie had infringed his publicity right
 28 where trial court found that the movie character did not use plaintiff’s likeness and only had some
 superficial similarities to plaintiff).

29 ¹⁰ *See generally* Decl. of E. Deborah Jay, Ex. C (Jay Report) at 6-8, Table 1.

1 not identify any player.

2

- 3 • **Ferragamo.** Fewer than 2% identified Plaintiff Vince Ferragamo as the avatar he
claims depicted him. In fact, 10% identified that avatar as a real player *other than*
Ferragamo, and 88% could not identify any real player at all.
- 4
- 5 • **DuPree.** Fewer than 1% identified Billy Joe DuPree as the avatar he claims
depicted him. In fact, 3% linked that avatar with other retired players, and 96%
did not, or could not, link that avatar to any player at all.¹¹
- 6

7 These results are not surprising. In deposition, Plaintiffs could not identify themselves,¹²
8 their teammates,¹³ their fellow class representatives,¹⁴ or other retired players.¹⁵ In sum, the only
9 record evidence establishes that the avatars Plaintiffs claim depict them are not readily
10 identifiable as them.¹⁶

11 Plaintiffs' identifiability argument has even less evidentiary support when considered as a
12

13 ¹¹ The Court previously asked whether Dr. Jay had surveyed the correct universe of people. *See*
14 Sept. 22, 2016 Hr'g Tr. at 36:19-23. The answer to that question is undeniably: “Yes.” The
15 proper universe of people for this type of survey consists of persons who are likely to buy the
16 product the defendant offers. *See* Jay Decl. ¶¶ 5-6; *see also* McCarthy § 3:12 (making clear that
17 the “relevant universe” for a right of publicity survey is the likely “purchasers of defendant’s
18 product or service”). Nor would it be appropriate, as Plaintiffs have suggested, to provide survey
19 respondents information about Plaintiffs before respondents were shown the at-issue *Madden*
20 *NFL* avatars. In order to appropriately measure identifiability, “it is essential to test how products
21 are actually seen in the marketplace.” Jay Decl. ¶¶ 7-8. To do otherwise—such as through back-
22 to-back or sequential presentation of images—“would create artificial, top-of-mind awareness of
23 plaintiff.” *Id.*; *see also* *Jordache Enters., Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482, 1488 (10th Cir.
24 1987) (discounting results of “side-by-side” comparison trademark survey); *THOIP v. Walt*
25 *Disney Co.*, 690 F. Supp. 2d 218, 236-37 (S.D.N.Y. 2010) (excluding survey using a sequential
26 display of marks because it did not sufficiently approximate the manner in which consumers
27 encountered the parties’ products in the marketplace: “THOIP has not shown a reasonable
28 likelihood that consumers would have proximately encountered the specific pairs of shirts
tested”).

¹² Slaughter Decl., Ex. G (“Ferragamo Dep.”) at 103:10-14.

¹³ Slaughter Decl., Ex. H (“Davis Dep.”) at 84:17-24; *id.* at 89:15-18 (explaining that he could
not identify avatars from his team because “[t]hat 1979 Buccaneers team had linebackers and
running backs that you would walk into the room and you wouldn’t be able to tell one from the
other”); *see also* *id.*, Ex. I (“DuPree Dep.”) at 38:20-41:21.

¹⁴ Davis Dep. at 73:17-74:20 (incorrectly identifying an avatar as Plaintiff DuPree because of the
avatar’s “size” and “physical appearance” before deciding that the avatar had “*some* of Billy’s
similarities” and “it could or could not” be him).

¹⁵ Davis Dep. at 64:21-65:9; 66:10-16; *see also* DuPree Dep. at 20:11-15; 22:5-18; 23:15-19;
24:14-19.

¹⁶ *Madden NFL* does not include Plaintiffs’ names. *See* Slaughter Decl., Ex. J (Decl. of Timothy
Cowan previously filed at ECF No. 205-12) ¶ 8; *see also* *id.*, Ex. K (Decl. of Timothy Cowan
previously filed at ECF No. 250-2) ¶ 7; PSJ Order at 3.

1 putative class. Plaintiffs' argument rests entirely on the SAC's allegation that Plaintiffs can rely
 2 on "official" "team media guides," which purportedly contain player information that is
 3 "consistently identical" to avatar information on the corresponding historic-team in *Madden NFL*.
 4 See SAC ¶¶ 31-32. That argument falls short for several reasons:

- 5 • **No media guides.** The record does not include media guides for the majority of
 6 teams in *Madden NFL*. See Slaughter Decl. ¶ 5. This means that the roster
 7 information—the supposed lynchpin of Plaintiffs' proof—simply does not exist
 8 for more than half of the historic-teams in *Madden NFL*.
- 9 • **Media guides do not match *Madden NFL*.** The player information from the
 10 media guides that are actually in the record does not match the avatar information
 11 in *Madden NFL*. An analysis of 20 randomly selected historic teams showed that
 12 only 11% of the avatars shared the same position, height, weight, age, and years of
 13 experience as real players from the same historic-team.¹⁷ Even when only
 14 position, height, and weight were considered, fewer than half of the avatars
 15 "matched" real players.¹⁸ It is more likely than not that any historic-team avatar
 16 will *not* share these basic characteristics with a real player on a given team.
- 17 • **Media guides are not complete sources.** The media guides in the record often do
 18 not have information on all the players, necessitating reference to other, arbitrary
 19 sources. For instance, the declaration by Brian Henri in support of Plaintiffs'
 20 original motion for class certification lists 47 members of the 1979 Rams, five of
 21 which do not appear in the media guide. See ECF No. 173-3 (Decl. of Brian Henri
 22 in Supp. of First Mot. for Class Certification ("Henri Decl.")), Ex. 9. For those
 23 five, Plaintiffs rely on other sources of information, such as the ESPN Pro Football
 24 Encyclopedia.
- 25 • **Duplicate avatars.** In many cases, real-world players share the same
 26 characteristics as several different avatars on the same team. For instance,
 27 according to Plaintiffs, the *Madden NFL 09* 1979 Buccaneers team included two
 28 defensive backs who were both 5'11", both 190 pounds, and both 24 years old.
 See SAC, Ex. A. This is no isolated example. A review of 20 of the 145 historic-
 teams in *Madden NFL 09* found that 64 real-world players shared the same
 characteristics as two or more different in-game avatars on the corresponding
 team. NERA Report ¶ 16. For instance, George Koonce played for the 1998
 Green Bay Packers and was listed as a 6'1", 245-pound linebacker. *Id.* In
Madden NFL 09, the 1998 Packers historic-team had three linebackers with those

26 ¹⁷ Slaughter Decl., Ex. L (Decl. of Garrett Glasgow previously filed at ECF No. 177-7 ("NERA
 27 Report")) ¶ 15.

28 ¹⁸ *Id.* ¶ 16. NERA's analysis of 20 historic-teams took over 150 hours. NERA Report ¶ 3. If a
 similar comparison were conducted for all 145 historic-teams in *Madden NFL 09*, it would take
 over 800 hours. *Id.*

1 exact statistics. *Id.* No reasonable jury could identify one from the other. ¹⁹

2

- 3 • **Conflicting data.** The information regarding an avatar, including height or
4 weight, often differs among different sources: the game, the team media guide,
5 and an encyclopedia that Plaintiffs rely on. For instance, Plaintiffs contend that
6 “H#40” on the 1979 historical Rams team is Elvis Peacock. *See* Henri Decl.,
7 Ex. 9. *Madden NFL 09* describes this avatar as weighing 208 pounds. The 1979
8 Rams Media Guide describes Peacock as weighing 220 pounds. Ex. M at 74. And
9 the ESPN Pro Football Encyclopedia (upon which Plaintiffs selectively relied in
10 Ex. 9) lists Peacock at 212 pounds. Ex. N. The finder of fact would have no basis
11 upon which to know which of these is right and whether the avatar depicted in
12 *Madden NFL*, if any, was actually Mr. Peacock.

13

- 14 • **No evidence the media guides are accurate.** Plaintiffs have candidly testified
15 there is no reliable way to determine whether media guides accurately reported
16 their weight, which regularly fluctuated during the course of a NFL season. ²⁰

17 In sum, (1) Plaintiffs have not adduced any admissible evidence that anyone in the
18 public—let alone more than a *de minimis* number of people—identifies them in *Madden NFL*;
19 (2) survey evidence shows the opposite—the public does not identify the avatars as Plaintiffs;
20 (3) the record does not contain rosters for the majority of teams in *Madden NFL*; (4) the rosters
21 that are in the record have information that does not match the information in *Madden NFL* and
22 are incomplete; and (5) many avatars in *Madden NFL* contain identical characteristics, making
23 individual identifiability based on those characteristics impossible. It is therefore unsurprising
24 that Plaintiff DuPree acknowledged that *Madden NFL* “scrambled the [retired players] into
25 anonymity.”²¹

26 Because there is “an absence of evidence” to prove that the historic-team avatars are
27 identifiable as Plaintiffs, EA is entitled to summary judgment. *Celotex*, 477 U.S. at 323.

28 B. Plaintiffs’ Claims Are Barred By The First Amendment

29 “[V]ideo games qualify for First Amendment protection.” *Brown v. Entm’t Merchs.*
30
31 *Ass’n*, 564 U.S. 786, 790 (2011); *see also Kirby v. Sega of Am., Inc.*, 144 Cal. App. 4th 58

32 ¹⁹ *See Henderson v. ZeniMax Media, Inc.*, No. CV-12-0418-TUC-BGM, 2013 WL 308765, at
33 *3 (D. Ariz. Jan. 25, 2013) (dismissing right of publicity claim alleging that a character in a video
34 game used plaintiff’s identity where the similarities were shared by many other people).

35 ²⁰ Davis Dep. at 21:16-22:10; 24:15-24; 25:1-3; Ferragamo Dep. at 44:25-47:9; 51:11-17.

36 ²¹ Slaughter Decl., Ex. O (“The Unbroken Line”) at 222.

(2006) (“Video games are expressive works entitled to as much First Amendment protection as the most profound literature.”). “Whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary when a new and different medium for communication appears.” *Brown*, 564 U.S. at 790 (quotation and citation omitted).

**1. Plaintiffs’ claims are subject to strict scrutiny and presumptively
barred by the First Amendment.**

The Ninth Circuit recently held that California’s right of publicity laws, when applied against an expressive work like *Madden NFL*, are content-based restrictions on speech, and therefore presumptively unconstitutional. *See Sarver v. Chartier*, 813 F.3d 891, 903 (9th Cir. 2016) (“By its terms, California’s right of publicity law clearly restricts speech based upon its content.”); *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”).²²

Sarver, which post-dates the Ninth Circuit’s decision in this case, applies here and compels judgment in EA’s favor. In *Sarver*, the Ninth Circuit held that California’s right of publicity laws, as applied against defendant’s expressive work, were “presumptively unconstitutional, and cannot stand unless [the plaintiff] can show a compelling state interest in preventing the defendants’ speech.” 813 F.3d at 906. Because the plaintiff could present no compelling state interest, the Ninth Circuit dismissed plaintiff’s claims on First Amendment grounds without addressing the California Supreme Court’s transformative-use test. *Id.* at 904 n.6 (“We need not and do not reach the question of whether such defense applies in this case.”).

Here, the content of the *Madden NFL* expressive work falls squarely within this well-recognized category of broad First Amendment protection: the incorporation of alleged elements of a person’s identity into a larger fictional expressive work. There is no compelling state interest

²² The Supreme Court has recognized a few, specific exceptions to this speech-protective rule: obscenity, defamation, fraud, fighting words, and true threats; and the Court steadfastly has refused to expand that list. *See United States v. Alvarez*, 567 U.S. 709, 717-18 (2012); *United States v. Stevens*, 559 U.S. 460, 482 (2010).

1 in barring “fictionalized portrayal[s]” of individuals’ lives. *Id.* at 906 n.9 (citing *Guglielmi v.*
 2 *Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 861 (1979)). The First Amendment “safeguards the
 3 storytellers and artists who take the raw materials of life—including the stories of real
 4 individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies
 5 or plays.” *Id.* at 905.

6 The Ninth Circuit’s earlier opinions in *In re NCAA Student-Athlete Name & Licensing Litig.*
 7 (“*Keller*”), 724 F.3d 1268 (9th Cir. 2013) and *Davis*, 775 F.3d 1172 (9th Cir. 2015), do not compel
 8 a different result. *Keller* presented materially different facts from those in this record. There, the
 9 Ninth Circuit stated that EA sought “to replicate each school’s entire team as accurately as possible,”
 10 that the *NCAA Football* in-game avatars wore the actual jersey numbers of real players and had the
 11 same “facial features” as them, that EA sought “to match any unique, highly identifiable playing
 12 behaviors by sending detailed questionnaires to team equipment managers,” and that EA allegedly
 13 allowed game players to compete as *current* college athletes, simulating the *current* college
 14 season. *See Keller*, 724 F.3d at 1268, 1271-72. *Keller*, thus, turned on the assumption that the
 15 avatars in *NCAA Football* looked and behaved exactly like their alleged real-life counterparts, and
 16 were intended to simulate a current football season.²³ Cf. *id.* Similarly, in this case, the Ninth
 17 Circuit also assumed that the *Madden NFL* historic-team avatars had used Plaintiffs’ “likenesses.”
 18 *See Davis*, 775 F.3d at 1177 n.2 (“EA does not seek to distinguish this case from *Keller*”).

19 The factual record in this case is now fully developed, and it is materially different from
 20 the assumed facts in *Keller* and *Davis*. The factual record here establishes that the *Madden NFL*
 21 historic-team avatars lack the literal realism assumed in *Keller*—they do not share numbers, facial
 22 features, or unique playing behaviors, and they are not portrayed in an accurate setting, or in the
 23 current season featuring their current opponents. *See, e.g.*, PSJ Order at 4 (none “of the avatars in the
 24 *Madden* games could be ‘readily identified’ as corresponding to any specific plaintiff based on the
 25 appearance of the avatar alone”). The *Madden NFL* historic-team avatars cannot be used to
 26 recreate Plaintiffs’ actual seasons, careers, or performances—they allow game-players to create
 27 fictionalized match-ups between teams from different eras. *See, e.g.*, Strauser Decl. ¶ 10. On this

28 ²³ As with the initial motions here, EA assumed the truth of Plaintiffs’ allegations in *Keller*.

1 record, Plaintiffs cannot overcome the constitutional presumption against right of publicity claims
 2 targeting expressive works. EA is entitled to summary judgment on First Amendment grounds.

3 **2. The First Amendment protects the inclusion of real-life elements in
 4 expressive works.**

5 Separately, the First Amendment protects the use of real-life elements in expressive
 6 works. Again, the fully developed factual record now establishes that the *Madden NFL* historic-
 7 team avatars are not exact replicas of their real-life counterparts, but rather EA's own graphic and
 8 programming expressions that allegedly share a limited number of characteristics with real-life
 9 persons. The First Amendment has long shielded such expressive works, mixing fact and fiction,
 10 from right of publicity claims.

11 The California Supreme Court has made clear that, “[w]hether the publication involved
 12 was factual and biographical or fictional, the right of publicity has not been held to outweigh the
 13 value of free expression [T]he creation of historical novels and other works inspired by
 14 actual events and people would be off limits to the fictional author.” *Guglielmi*, 25 Cal. 3d at
 15 872. In *Guglielmi*, the court extended First Amendment protection to a filmmaker’s use of
 16 Rudolph Valentino’s “name, likeness and personality” in a “fictionalized version” of the actor’s
 17 life. *Id.* at 862. The court did not distinguish between the First Amendment protection provided
 18 to “fictional and factual accounts of Valentino’s life. Respondents’ election of the former as the
 19 mode for their views does not diminish the constitutional protection afforded speech.” *Id.* at 868.
 20 And it made no difference that the use of Valentino’s name, likeness, or personality was for
 21 entertaining, rather than traditional reporting. *Cf. id.* at 867 (“[E]ntertainment is entitled to the
 22 same constitutional protection as the exposition of ideas.”); *see also Winters v. New York*, 333
 23 U.S. 507, 510 (1948) (“The line between the informing and the entertaining is too elusive for
 24 protection of the basic right What is one man’s amusement, teaches another’s doctrine.”).

25 More recently, courts have applied similar First Amendment protections to the use of
 26 athletes’ names, likenesses, and biographical data in fantasy sports games—works of
 27 entertainment that, like “docudramas,” intermingle fact and fiction. In *CBC Distribution and
 28 Marketing, Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818 (8th Cir. 2007), the
 court held that CBC’s use of “names, nicknames, likenesses, signatures, pictures, playing records,

1 and/or biographical data of each player in an interactive form in connection with its fantasy
 2 baseball products" to be protected by the First Amendment. *Id.* at 823 (quotations omitted). In
 3 explaining why the fantasy sports games are expressive works entitled to First Amendment
 4 protection, the court specifically analogized the games to video games. *See id.* It further held
 5 that the factual "information used in CBC's fantasy baseball games is all readily available in the
 6 public domain, and it would be strange law that a person would not have a first amendment right
 7 to use information that is available to everyone." *Id.*; *see also CBS Interactive Inc. v. Nat'l*
 8 *Football League Players Ass'n, Inc.*, 259 F.R.D. 398, 417 (2009) ("[L]ike in *C.B.C. Distribution*,
 9 the package of information used here comes within the ambit of the First Amendment.").

10 Including an athlete's height, weight, age, and years played within an expressive work like
 11 *Madden NFL* is indistinguishable from including the same factual information in other expressive
 12 works such as docudramas and fantasy sports games. In *Keller*, the Ninth Circuit distinguished
 13 *CBC* by noting that the fantasy sports products "merely incorporated the names along with
 14 performance and biographical data of actual major league baseball players." 724 F.3d at 1283
 15 n.12. The court continued that "*NCAA Football*, on the other hand, uses virtual likenesses of
 16 actual college football players." *Id.* Whether or not that distinction has merit, it doesn't apply
 17 here: it is undisputed that *Madden NFL* does not use Plaintiffs' "virtual likenesses." *See* PSJ
 18 Order at 4; PSJ Recons. Order at 6. Under the Ninth Circuit's own distinction, EA's alleged use
 19 of Plaintiffs' "performance and biographical data" is analogous to the First Amendment-protected
 20 uses in *CBC*'s fantasy sports games.

21 This outcome makes sense. Plaintiffs contend that EA drew the height, weight, age, and
 22 years played experience from publicly available sources already protected by the First
 23 Amendment, such as media guides or sports websites. Whether EA's own expressive work is
 24 characterized as fact or fiction, or a mix thereof, or as reporting or entertaining, or a mix thereof,
 25 is irrelevant. *See Guglielmi*, 25 Cal. 3d at 867-68. "The line between the informing and the
 26 entertaining is too elusive for the protection of that basic right." *Joseph Burstyn, Inc. v. Wilson*,
 27 343 U.S. 495, 501 (1952) (holding movies to be protected by the First Amendment) (*quoting*
 28 *Winters*, 333 U.S. 507 at 510). For example, in *Gionfriddo v. Major League Baseball*, 94 Cal.

1 App. 4th 400 (2001), the court held that use of baseball players' biographical information and
 2 statistics on defendant's website were protected under the First Amendment regardless of whether
 3 they were classified as factual reporting or entertainment. *Id.* at 410. "Entertainment features
 4 receive the same constitutional protection as factual news reports." *Id.* First Amendment
 5 protection does not depend on whether viewers of the work use it as a source of factual
 6 information, entertainment, or both.

7 Courts must treat expressive works equally under the First Amendment. If a filmmaker
 8 cast generic-looking actors as unnamed characters that shared Plaintiffs' height, weight, age, and
 9 years of experience in a docudrama about historic NFL teams, there would be little doubt that the
 10 First Amendment would protect the filmmaker from Plaintiffs' right of publicity claim. *See*
 11 *Guglielmi*, 25 Cal. 3d at 872; *see also* *CBC Distrib.*, 505 F.3d at 823 (holding that the First
 12 Amendment protects a fantasy sports website's use of athletes' "names, nicknames, likenesses,
 13 signatures, pictures, playing records, and/or biographical data"). *Madden NFL* cannot be treated
 14 differently.

15 **3. The avatars on *Madden NFL*'s historical teams are transformative.**

16 Now that the record is fully developed, the actual facts are materially different from those
 17 assumed when the Court and the Ninth Circuit originally considered EA's First Amendment defense
 18 and, specifically, the transformative-use defense.

19 To determine whether the First Amendment bars a right of publicity claim under the
 20 transformative-use test, "the inquiry is whether the celebrity likeness is one of the 'raw materials'
 21 from which an original work is synthesized, or whether the depiction or imitation of the celebrity
 22 is the very sum and substance of the work in question." *Comedy III Prods., Inc. v. Gary Saderup,*
 23 *Inc.*, 25 Cal. 4th 387, 406 (2001). In *Comedy III*, the California Supreme Court expressly
 24 recognized that the "fictionalized portrayal" of an individual is sufficiently transformative to
 25 "require First Amendment protection." *Id.* On the other hand, "literal, conventional" depictions
 26 of celebrities are not. *Id.* at 409. With this distinction in mind, the *Comedy III* court held that a t-
 27 shirt featuring only a photo-realistic drawing of the Three Stooges was a non-transformative use
 28 of celebrity likenesses. *See id.*

1 Here, the Court previously assumed the truth of Plaintiffs' allegations and concluded that
 2 "EA's use of plaintiffs' likenesses, though highly sophisticated, is the digital equivalent of
 3 transferring the Three Stooges' images onto a t-shirt." ECF No. 110 at 9 (citing *Comedy III*, 25 Cal.
 4th at 408-10). The Ninth Circuit similarly assumed, based on Plaintiffs' allegations, that "the
 5 individual players' likenesses" were not "transformed more in *Madden NFL* than they were in *NCAA
 6 Football*." *Davis*, 775 F.3d at 1178.

7 The fully developed factual record, however, no longer supports these assumptions. EA's
 8 historic-team avatars are not literal, conventional depictions of Plaintiffs. EA's historic-team
 9 avatars do not depict Plaintiffs' visual images or likenesses. "[N]o reasonable fact-finder could
 10 conclude that a particular avatar is identifiable as a particular player based solely on the appearance of
 11 the image." PSJ Reconsideration Order at 6; *see also* PSJ Order at 4 ("[P]laintiffs have made no
 12 attempt to show ... that *any* of the avatars in the Madden games could be 'readily identified' as
 13 corresponding to any specific plaintiff based on the appearance of the avatar alone.") (emphasis in
 14 original). Instead, the avatars use generic faces—created by EA—that are shared among
 15 hundreds of avatars and do not depict Plaintiffs' individual features. The historic-team avatars
 16 also do not use Plaintiffs' names or numbers. At nearly all points in the game, a game-player
 17 would see only EA's own creative content (faces, bodies, names and numbers) or elements
 18 licensed from third parties (jerseys and logos)—not the four select, limited elements (height,
 19 weight, age, years played) that Plaintiffs claim as their property.

20 These four characteristics that Plaintiffs allege are shared by the historic-team avatars are
 21 only "raw materials from which an original work is synthesized." *Comedy III*, 25 Cal. 4th at 406.
 22 They are only a few of thousands of graphic and data elements that comprise the historic-team
 23 avatars. *See* Moore Dep. at 342:13-18 ("[Y]ou are cherry-picking in a way with just a handful of
 24 the data points and then disregarding the other data points that show that this is [a] Joe Average
 25 kind of guy—especially when we look ... at the pictures of them."). Plaintiffs have no interest in
 26 the subjective player ratings created by EA's designers (like speed, strength, agility, passing
 27 accuracy) that were based on a given historic-team's strengths and weaknesses. *Id.* at 116:16-18;
 28 *see also* Carty Dep. at 102:20-103:2. These subjective ratings greatly outnumber the four

1 characteristics listed by Plaintiffs and dramatically outweigh them in terms of game-play
 2 importance. *See* Moore Dep. at 314:22-24 (“[W]e can go over the height and the weight thing.
 3 But . . . again, that is 4 items out of 100 that make up a player.”).

4 The in-game situations in which the avatars appear are also fictional. Unlike *NCAA*
 5 *Football's* and *Madden NFL's* primary gameplay mode—which involve then-current teams,
 6 simulating a then-current season—the historic-team feature is counter-factual, pitting teams from
 7 different eras against each other. The results of *Madden NFL* historic-team games are out-of-time
 8 historical fictions—professional football versions of *A Connecticut Yankee in King Arthur's*
 9 *Court* or *Back to the Future*. The historic-team feature is not focused on recreating teams' actual
 10 games, but rather on creating fantasy match-ups, and, as such, are protected under the First
 11 Amendment. *See ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 936 (6th Cir. 2003) (protecting
 12 under the First Amendment a literal depiction of Tiger Woods because the work “includes not
 13 only images of Woods and the two caddies, but also carefully crafted likenesses of six past
 14 winners of the Masters Tournament”).

15 Ultimately, the *Madden NFL* historic-team avatars are akin to the characters in video games
 16 and other expressive works that evoke real individuals, but are not literal depictions of them. For
 17 example, in *Kirby v. Sega of America, Inc.*, 144 Cal. App. 4th 47 (2006), the court held that “any
 18 imitation of [Kirby's] likeness or identity in Ulala is not the sum and substance of that character.” *Id.*
 19 at 61. “Rather, the imitation is part of the raw material from which the Ulala character, and SC[5],
 20 were synthesized.” *Id.* Likewise, in *Winter v. DC Comics*, 30 Cal. 4th 881 (2003), the California
 21 Supreme Court held that “[a]lthough the fictional characters Johnny and Edgar Autumn are less-than-
 22 subtle evocations of Johnny and Edgar Winter, the books do not depict plaintiffs literally. Instead,
 23 plaintiffs are merely part of the raw materials from which the comic books were synthesized.” *Id.* at
 24 890.²⁴ Because the record here now undisputedly establishes that the *Madden NFL* historic-team
 25 avatars are created from many “raw materials”—not simply the height, weight, age, and years
 26

27 ²⁴ *See also Ross v. Roberts*, 222 Cal. App. 4th 677, 689 (2013) (“Robert's music may be
 28 analogized to a work of fiction in which the protagonist bears some resemblance to the original
 Rick Ross. The resemblance is only one ‘raw material’ upon which the story is based, but it is
 merely a minor detail when viewed in the context of the larger story.”).

1 played—summary judgment is appropriate. *Comedy III*, 25 Cal. 4th at 406.²⁵

2 **C. Plaintiffs' Claims Are Preempted By The Copyright Act**

3 EA incorporates by reference the arguments it advanced in moving to dismiss Plaintiffs'

4 SAC on copyright preemption grounds. *See* ECF No. 268 at 4-10. In denying EA's motion to

5 dismiss, the Court held that EA's alleged use of Plaintiffs' identities in *Madden NFL* was not

6 protected under the Copyright Act because it "is not fixed in a tangible medium of expression"

7 where the "game play in the *Madden* games is dynamic, interactive, variable, and in the hands of

8 the consumer." ECF No. 317 at 4.

9 In fact, courts consistently have held that the audiovisual elements in a video game are

10 "fixed" as that term is interpreted under the Act. For instance, in *Williams Electronics, Inc. v.*

11 *Arctic International, Inc.*, 685 F.2d 870 (3d Cir. 1982), the court rejected the contention that the

12 audiovisual output of a videogame generated during gameplay is "transient, and cannot be

13 'fixed.'" *Id.* at 874. Rather, the court held that the "audiovisual work is permanently embodied

14 in a material object, the memory devices, from which it can be perceived with the aid of the other

15 components of the game." *Id.* (citing *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 855-56 (2d

16 Cir. 1982) and *Midway Mfg. Co. v. Drikschneider*, 543 F. Supp. 466, 479-480 (D. Neb. 1981)).

17 The court further held that "although there is player interaction with the game during the play

18 mode that may cause the audiovisual presentation to change in some respects from one game to

19 the next in response to the player's varying participation, there is always a repetitive sequence of

20 a substantial portion of the sights and sounds of the game, and many aspects of the display remain

21

22

23

24

25 ²⁵ These facts distinguish this case from *No Doubt v. Activision Publishing, Inc.*, 192 Cal. App.

26 4th 1018 (2011). In *No Doubt*, the defendant did "not dispute that the avatars of No Doubt are

27 computer-generated recreations of the real band members, painstakingly designed to mimic their

28 likeness." *Id.* at 1033. Defendant went so far as to require No Doubt to pose for "motion-capture

photography to enable [defendant] to reproduce their likenesses, movements, and sounds with

precision." *Id.* Here, the record establishes that the historic-team avatars are generic in

appearance, not—as in *No Doubt*—"immutable images of the real celebrity [players]." *Id.*

1 constant from game to game regardless of how the player operates the controls.” *Id.*²⁶

2 The same is true here: the audiovisual features of *Madden NFL* were fixed on a memory
 3 device on which the game was distributed and, during game play, those elements were simply
 4 repeated over and over. *See Decl. of Timothy Cowan in Supp. of Mot. for Summ. J.* ¶¶ 4-5.
 5 Therefore, for the reasons articulated in EA’s motion to dismiss the SAC, *Maloney v. T3Media,*
 6 *Inc.*, 853 F.3d 1004 (9th Cir. 2017), dictates that the Court grant judgment for EA on copyright
 7 preemption grounds. *See id.* at 1019-20.

8 **D. Plaintiffs’ Ancillary Claims Fail As A Matter Of Law**

9 Plaintiffs’ ancillary claims (conversion, trespass to chattels, unjust enrichment, and UCL)
 10 derive and depend on their right of publicity claim. *See SAC* ¶ 96-97, 106-107, 112, 117. These
 11 claims fall if Plaintiffs’ right of publicity claim falls. *See Kimball v. Flagstar Bank F.S.B.*, 881 F.
 12 Supp. 2d 1209, 1224 (S.D. Cal. 2012); *Lazar v. Hertz Corp.*, 69 Cal. App. 4th 1494, 1505 (1999);
 13 *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1075 (N.D. Cal. 2012).

14 EA is entitled to judgment on them for the following separate and independent reasons.

15 **1. Plaintiffs are not entitled to any relief under the UCL.**

16 EA is entitled to judgment on Plaintiffs’ UCL claim because Plaintiffs are not entitled to
 17 any relief under the UCL. California’s UCL permits only two forms of relief: restitution and
 18 injunctive relief. *See Clark v. Super. Ct.*, 50 Cal. 4th 605, 608-09 (2010). Where a plaintiff
 19 cannot recover either form of relief, the UCL claim fails as a matter of law. *See In re First All.*
 20 *Mortg. Co.*, 471 F.3d 977, 996 (9th Cir. 2006) (granting summary judgment because, even if
 21 defendant’s conduct violated the UCL, plaintiffs were not eligible for Section 17200’s remedies).

22 The *sole* remedy Plaintiffs seek under the UCL is disgorgement of EA’s profits. SAC
 23 ¶ 118. But that remedy seeks neither appropriate injunctive relief nor restitution—*i.e.*, that the
 24 profits sought from EA were either obtained directly from any Plaintiff or that any Plaintiff

25 ²⁶ *See also Micro Star v. Formgen Inc.*, 154 F. 3d 1107, 1111-12 (9th Cir. 1998) (audiovisual
 26 displays created by the defendant’s map files met the fixation requirement); *Atari Games Corp. v. Oman*, 979 F.2d 242, 245 (D.C. Cir. 1992) (Ginsburg, J.) (rejecting Copyright Office’s
 27 suggestion that a video game does not meet the standard of fixation because the visual output
 28 during videogame play is made by the player and not by the author of the video game and ruling
 instead that the “hallmark of a video game is the expression found in the entire effect of the game
 as it appears and sounds”) (internal quotations and citation omitted).

1 otherwise had an ownership interest in the profits.²⁷ To meet this ownership requirement,
 2 Plaintiffs must show that their property can “clearly be traced to *particular funds or property* in
 3 the defendant’s possession.” *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 699
 4 (2006) (UCL restitution is available only where the sum at issue can be traced). Plaintiffs have
 5 not offered *any* evidence to establish that EA has funds or property traceable to them.²⁸ Just as in
 6 *Korea Supply*, Plaintiffs are not entitled to restitution because they do not have an ownership
 7 interest in EA’s profits. *Cf.* 29 Cal. 4th at 1150. None of Plaintiffs’ property can “clearly be
 8 traced to *particular funds or property* in the defendant’s possession.” *Colgan*, 135 Cal. App. 4th
 9 at 699 (emphasis added). Plaintiffs never purchased *Madden NFL* nor transmitted monies or
 10 property to EA. *See* Slaughter Decl., Ex. P (Pls.’ Am. Resps. to EA’s Sec. Set of Interrogs.) at
 11 No. 12.

12 Plaintiffs attempt to backdoor “actual damages under the guise of restitution” by alleging
 13 that EA “took” the “economic value intrinsic in [their] indentit[ies], and/or likeness[es].”
 14 Slaughter Decl., Ex. Q (Pls.’ Resps. to EA’s Sec. Set of Interrogs.) at Nos. 13-14. This tactic has
 15 long been rejected. *See, e.g., Mai Sys. Corp. v. UIPS*, 856 F. Supp. 538, 542 (N.D. Cal. 1994)
 16 (rejecting UCL claim based on “a lost business opportunity” because compensation for such an
 17 injury is “a measure of damages and not restitution” and therefore “barred by the rule limiting
 18 recovery under Section 17203 to restitution and injunctive relief”).²⁹

19 ²⁷ *See Groupon, LLC v. Groupon, Inc.*, 859 F. Supp. 2d 1067, 1083 (N.D. Cal. 2012) (granting
 20 summary judgment on a UCL claim because plaintiff “ha[d] not submitted any evidence, or . . .
 21 argument, to show that [defendant] obtained money from [plaintiff] or that [plaintiff] otherwise
 22 ha[d] any ownership interest of any of [defendant’s] profits”); *In re First All. Mortg.*, 471 F.3d at
 23 996 (same); *see also Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1150 (2003)
 24 (disgorgement of profits “where the[] profits are neither money taken from a plaintiff nor funds in
 25 which the plaintiff has an ownership interest . . . is not an authorized remedy in an individual
 26 action under the UCL”).

27 ²⁸ Recognizing their problems under the UCL, Plaintiffs try to characterize their remedy as
 28 “*injunctive relief* that EA disgorge all its profits” SAC ¶ 118. But changing the label does
 29 not change the remedy. *See, e.g., Korea Supply*, 29 Cal. 4th at 1148-49 (noting that, although
 30 “plaintiff describes its requested remedy as ‘restitution,’” that “term does not accurately describe
 31 the relief sought by plaintiff”)

32 ²⁹ *See also EchoStar Satellite Corp. v. NDS Grp. PLC*, No. SA CV03-0950-DOC, 2008 WL
 33 4596644, at *9 (C.D. Cal. Oct. 15, 2008) (in rejecting argument that defendant had violated UCL
 34 by taking “value” of secure smart card and publicly posting instructions on how to hack plaintiff’s
 35 smart card, court noted that relief sought “would eviscerate the distinction between restitution and
 36 damages” because “[a]ny plaintiff who suffered injury to property could claim restitution because
 37 the defendant ‘took away’ the value of the property”).

1 Because Plaintiffs are not entitled to restitution or injunctive relief, their UCL claim
 2 should be dismissed. *See Groupon*, 859 F. Supp. 2d at 1083.

3 **2. Plaintiffs' conversion and trespass claims fail as a matter of law.**

4 Plaintiffs' conversion claim requires that they adduce competent evidence of:
 5 “(1) ownership or right to possession of property, (2) wrongful disposition of the property right
 6 and (3) damages.” *Kremen v. Cohen*, 337 F.3d 1024, 1029 (9th Cir. 2003). Plaintiffs' trespass to
 7 chattels claim requires proof of the same underlying elements, except that they need only prove
 8 that EA substantially interfered with, not dispossessed, their property rights. *See Intel Corp. v.*
 9 *Hamidi*, 30 Cal. 4th 1342, 1357 (2003) (quoting Restatement (Second) of Torts § 218). Both
 10 causes of action fail because Plaintiffs have not shown that (1) the information allegedly used by
 11 EA constitutes a cognizable “property;” or (2) EA substantially interfered with or dispossessed
 12 them of that cognizable property.

13 **a. Plaintiffs cannot demonstrate that the information EA allegedly
 14 used is “property” for conversion and trespass to chattels
 claims.**

15 Conversion and trespass to chattels both require cognizable “property” owned by the
 16 plaintiff. *See Kremen*, 337 F.3d at 1029; *Hamidi*, 30 Cal. 4th at 1357. Plaintiffs have identified
 17 no property with which EA allegedly interfered. EA asked Plaintiffs to identify what “property”
 18 they claim EA took or damaged. Slaughter Decl., Ex. Q (Pls.’ Resp. to EA’s Second Set of
 19 Interrogs.) at Nos. 13 and 14. Plaintiffs responded to EA’s discovery by narrowing EA’s
 20 interrogatories to *exclude* property: “assuming this interrogatory seeks to inquire as the ‘economic
 21 rights’ of Plaintiff taken by EA and not ‘property.’” Of course, EA did not ask about “economic
 22 rights,” but property itself. EA is entitled to judgment on Plaintiffs’ conversion and trespass
 23 claims because Plaintiffs have not identified any cognizable “property” with which EA
 24 interfered.³⁰

25 Even so, “economic rights” are not the type of interest that supports a conversion or
 26 trespass claim. In order to maintain a conversion or trespass claim “where the alleged

27
 28 ³⁰ Plaintiffs’ evasiveness is notable because courts have uniformly held that the right of publicity
 is a property right. *See, e.g.*, *Waits*, 978 F.2d at 1100.

1 interference is to an intangible interest,” ECF No. 110 at 14, the plaintiff must prove that the
2 intangible property (1) is capable of precise definition; (2) is capable of exclusive possession and
3 control, and (3) the owner must have established a legitimate claim to exclusivity. *Kremen*, 337
4 F.3d at 1030. Courts consistently have found that personal information (such as a person’s height
5 and weight) is not capable of precise definition or exclusive control and does not pass the *Kremen*
6 test. *See, e.g., In re iPhone Application*, 844 F. Supp. 2d at 1075 (dismissing conversion claim
7 because plaintiff could not establish cognizable property interest in personal information,
8 including “location, zip code, device identifier, and other data”); *Low v. LinkedIn Corp.*, 900 F.
9 Supp. 2d 1010, 1029 (N.D. Cal. 2012); *see also Yunker v. Pandora Media, Inc.*, No. 11-CV-
10 03113 JSW, 2013 WL 1282980, at *17 (N.D. Cal. Mar. 26, 2013) (dismissing conversion claim
11 based on conversion of personal information, such as “age, gender, location and the UUID
12 [unique device identifier] on [a] mobile device” because the information was not capable of
13 exclusive control). Just so here.

b. EA did not dispossess or substantially interfere with Plaintiffs' property.

To succeed on a conversion claim, a plaintiff has the burden to prove that the defendant “substantially” interfered with his or her property. *See CACI No. 2100; see also Lee v. Hanley*, 61 Cal. 4th 1225, 1240 (2015). Likewise, under a claim for trespass, a plaintiff must prove that his or her property was “impaired as to its condition, quality, or value, or the possessor is deprived of the use of the chattel for a substantial time.” *In re iPhone Application*, 844 F. Supp. 2d at 1069 (quotations and citation omitted). Plaintiffs have no evidence that EA dispossessed them of, or substantially interfered with, any cognizable property.

22 In *In re iPhone Application*, the plaintiffs alleged a trespass claim on the basis that Apple
23 had installed location software that consumed memory, bandwidth, and storage on their phones.
24 *See id.* The court dismissed this claim, explaining that, although the allegations “conceivably
25 constitute a harm, they do not plausibly establish a significant reduction in service constituting an
26 *interference* with the intended functioning of the system, which is necessary to establish a cause
27 of action for trespass.” *Id.* (emphasis added). A plaintiff’s burden in a conversion claim is even
28 higher: defendant’s conduct must amount to “substantial interference.” *Zaslow v. Kroenert*, 29

1 Cal. 2d 541, 551 (1946); *DocMagic, Inc. v. Ellie Mae, Inc.*, No. 3:09-CV-4017-MHP, 2011 WL
 2 871480, at *11 (N.D. Cal. Mar. 11, 2011) (rejecting conversion claim where owners of uploaded
 3 loan information could not prove “the loss of *full* dominion over” personal data compiled by
 4 defendant) (emphasis added).

5 Here, there is no evidence that EA substantially interfered with Plaintiffs personal
 6 information. Rather, Plaintiffs merely assert that EA took from them “the right to control the
 7 commercial exploitation of [their] names, images, identities and/or likenesses.” Slaughter Decl.,
 8 Ex. Q (Pls.’ Resps. to Sec. Set of Interrogs.) at Nos. 13 and 14. But this assertion is contradicted
 9 by Plaintiff Dupree’s contemporaneous licensing of his image, which confirms that Plaintiffs
 10 retained their rights to control commercial exploitation of their image. *Id.* Ex. R (Pl. Dupree’s
 11 Further Am. Resp. to Reqs. For Admissions) at No. 33. Indeed, there is no actual evidence to
 12 support that assertion. In short, EA did not prevent Plaintiffs from making use of their property
 13 for *any* period of time. *Cf. In re iPhone Application*, 844 F. Supp. 2d at 1069.

14 EA is entitled to judgment on Plaintiffs’ conversion and trespass to chattel claims.

15 **3. EA is entitled to summary judgment on Plaintiffs’ unjust enrichment
 16 claim.**

17 EA previously moved to dismiss Plaintiffs’ claim for unjust enrichment because unjust
 18 enrichment is not recognized under California law absent grounds for imposing a constructive
 19 trust. *See* ECF No. 63 at 122; *see also* ECF No. 110 at 14. The Court denied that motion because
 20 Plaintiffs’ First Amended Complaint had alleged that “EA is an involuntary trustee holding all
 21 such sums in its possession under a constructive trust” ECF No. 110 at 14 (citing FAC ¶
 22 82). The record is now fully developed, and there is no evidence to support the imposition of a
 23 constructive trust because EA is not holding any property belonging to Plaintiffs. *See supra*
 24 section IV.D.I. Moreover, the Court held that a plaintiff can maintain a standalone claim for
 25 unjust enrichment *only* where the plaintiff is entitled to some form of restitution. *See* ECF No.
 26 110 at 4; *see also* *Monet v. Chase Home Fin., LLC*, No. C 10-0135 RS, 2010 WL 2486376, at *3
 27 (N.D. Cal. June 16, 2010); Restatement of Restitution § 1 (1936) (“A person who has been
 28 unjustly enriched at the expense of another is required to make restitution to the other.”). As
 demonstrated above, Plaintiffs are not entitled to restitution and therefore could not succeed on

1 the claim even if it had been properly pled.

2 EA is entitled to judgment on Plaintiffs' unjust enrichment claim.

3 **E. Only *Madden NFL 09* Falls Within The Statutes of Limitations**

4 The statute of limitations for a right of publicity claim in California is two years. *See Cal.*
 5 *Code Civ. Proc. § 339; Christoff v. Nestle USA, INC.*, 47 Cal. 4th 468, 476 n.7 (2009); *Alberghetti*
 6 *v. Corbis Corp.*, 713 F. Supp. 2d 971, 976 (C.D. Cal. 2010).³¹ Plaintiffs' conversion, trespass to
 7 chattels, and unjust enrichment claims also are subject to the two-year statute because the claims'
 8 gravamen is the same as Plaintiffs' right of publicity claims. *See Hensler v. City of Glendale*, 8
 9 Cal. 4th 1, 22-23 (1994); *Alberghetti*, 713 F. Supp. 2d at 983-84. This case was filed on July 29,
 10 2010, ECF No. 1, so only those *Madden NFL* games that include the historic-team feature
 11 published on or after July 29, 2008 are within the statute of limitations. Only *Madden NFL 09*,
 12 released on August 12, 2008, falls within that period.³² Claims targeting earlier games are time-
 13 barred.

14 **V. CONCLUSION**

15 For these reasons, EA respectfully requests that the Court enter judgment for EA on all of
 16 Plaintiffs' claims.

17 Dated: February 16, 2018

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26 ³¹ While the statute of limitations for an UCL claim may be four years, because Plaintiffs cannot
 27 state an UCL claim, a four-year statute does not apply.

28 ³² Pursuant to the single-publication rule, "a single cause of action . . . accrues upon the first
 29 publication of the communication, thereby 'spar[ing] the courts from litigation 'of stale claims'
 30 where a [work] is resold years later." *Roberts v. McAfee, Inc.*, 660 F.3d 1156, 1166-67 (9th Cir.
 31 2011). Plaintiffs have suggested that EA "re-published" earlier versions of *Madden NFL* within
 32 the statutory period by lowering the price of the game in order to target a new audience. Not true.
 33 The last time that EA lowered the price of any edition of *Madden NFL* that included historic-
 34 teams was on May 2, 2008, which falls outside the statute of limitations. *See* Ferwerda Decl. ¶ 7.